Supreme Court, U. S.
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IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1976

No. 76-293

GRADY TAYLOR,
Petitioner,

vs.

STATE OF TENNESSEE,
Respondent.

BRIEF IN OPPOSITION TO PETITION FOR A WRIT OF CERTIORARI

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The respondent, State of Tennessee, respectfully submits that the Petition for Writ of Certiorari filed in this case should be denied.

OPINIONS BELOW

The opinion of the Tennessee Supreme Court finding the motion pictures involved herein to be obscene is reported at 529 S.W.2d 692. The opinion of the Court of Criminal Appeals of Tennessee subsequently affirming the petitioner's conviction for exhibiting obscene materials dated March 1, 1976

is unreported but appears as Appendix A to the Petition for Writ of Certiorari. The Tennessee Supreme Court declined to review this case further on June 1, 1976 without opinion.

JURISDICTION

The jurisdiction of this Court is invoked under 28 U.S.C. 1257(3).

CONSTITUTIONAL PROVISIONS AND STATUTES INVOLVED

The First, Fourth, Fifth and Fourteenth Amendments to the United States Constitution and T.C.A. §§ 39-3010 through 39-3022 as they existed at the time this offense was committed.[1] These statutes appear as "Appendix A" to this brief.

QUESTIONS PRESENTED

The petitioner presents four (4) questions to this Court for review:

[1] There have been four legislative changes and one major judicial change in Tennessee's obscenity statutes since this action was commenced. Chapter 205, Public Acts of 1975, now codified at T.C.A. §39-3023 concerns the exhibition of X-rated films at outdoor theatres. Chapter 306, Public Acts of 1975, repealed T.C.A. §39-3013(D)(3). Chapter 574, Public Acts of 1976, contained a minor amendment to T.C.A. §39-3014, and Chapter 635, Public Acts of 1976, amends T.C.A. §39-3014 to cover persons with no fixed place of business. It also provides that notices need not be given before search warrants are obtained and that the law contemplates the use of civil or criminal proceedings or both used either independently or simultaneously. On September 7, 1976, the Tennessee Supreme Court elided from T.C.A. §39-3016(A) the language "in the opinion of the district attorney general or his designated representative." *Anthony v. Carter*, Shelby Law (Tenn., filed Sept. 7, 1976) (For Publication). See Appendix B.

1. Whether the Tennessee statute (T.C.A. § 39-3013) defining the crime of distribution or exhibition of obscene material is unconstitutional because the statute omits any requirement of knowledge by the defendant for distribution or exhibition within the State of Tennessee.

2. Whether the Tennessee statute providing a civil remedy to enjoin and prohibit future exhibition of obscene material must be construed to permit a criminal charge only for an exhibition or distribution subsequent to the beginning of the civil suit requesting an injunction prohibiting exhibition.

3. Whether the injunction proceeding requiring a defendant to produce a motion picture or other material is part of the criminal scheme and, in reality, a search warrant so that there is an illegal search and seizure in that the statute is unconstitutional and void in violation of the First, Fourth, Fifth and Fourteenth Amendments of the United States Constitution. The search warrant provisions of the statute T.C.A. § 39-3106 authorize a general warrant permitting the seizure of one copy of whatever the District Attorney General or his designated representative decides is obscene without judicial sanction.

4. Whether the motion picture films are not obscene is a matter of law and protected under the First Amendment.

STATEMENT OF THE CASE

On March 23, 1974, the District Attorney General for Sullivan County, Tennessee filed a civil petition pursuant to T.C.A. § 39-3019 requesting that two motion pictures being publicly exhibited by the petitioner at the Graphic Arts Cinema in Bristol, Tennessee be declared obscene. The Court heard this matter and personally viewed the two films, one untitled and the other titled "Horny Hobo," on April 4, 1974. On May 31,

1974, the trial court entered an order finding the films to be obscene and permanently enjoining the petitioner from exhibiting these films. The petitioner duly perfected an appeal directly to the Tennessee Supreme Court pursuant to T.C.A. § 39-3019(C) alleging that T.C.A. §§ 39-3010 *et seq.* was unconstitutional on various grounds substantially similar to those raised in this petition. On October 20, 1975, the Tennessee Supreme Court affirmed the judgment of the trial court by finding that T.C.A. §§ 39-3010 *et seq.* were constitutional and that the films in question were obscene. *Taylor v. State ex rel. Kirkpatrick*, 529 S.W.2d 692 (Tenn. 1975).

On May 2, 1974, the Sullivan County District Attorney General notified the petitioner that the State intended to commence criminal proceedings against him. On May 6, 1974, the State obtained an arrest warrant basing its issuance on a detailed affidavit dated March 23, 1974, by a police officer who had personally viewed these two motion pictures on March 20, 1974. On May 21, 1974, the petitioner specifically waived a preliminary hearing.

The petitioner was subsequently indicted on July 17, 1974, by the Sullivan County Grand Jury at its July, 1974 term charging him with knowingly exhibiting and displaying obscene films in violation of T.C.A. §39-3013. On December 5, 1974, the petitioner entered a plea of not guilty to the charge of exhibiting obscene materials and the jury found him guilty of violating T.C.A. §39-3013 and fixed his punishment at six months in the county jail and imposed a three thousand dollar fine. The Tennessee Court of Criminal Appeals affirmed the petitioner's conviction on March 1, 1976, and on June 1, 1976, the Tennessee Supreme Court summarily denied the petitioner's petition for writ of certiorari.

REASONS FOR DENYING THE WRIT

I

T.C.A. §39-3013(A), Both on Its Face and as Construed by the Tennessee Supreme Court, Contains the Constitutionally Required Element of Scienter.

The petitioner first claims that T.C.A. §39-3013(A) is constitutionally defective because it does not require as an element of the crime of exhibiting obscene materials that the accused had knowledge of the character of the materials he was exhibiting. The full text of this section provides:

> "It shall be unlawful to knowingly send or cause to be sent, bring or cause to be brought, into this state, for sale, distribution, exhibition or display, or in this state to prepare for distribution, publish, print, exhibit, distribute, or offer to distribute any obscene matter. It shall be unlawful to direct, present, or produce any obscene theatrical production or live performance and every person who participates in that part of such production which renders said production or performance obscene is guilty of said offense."

The Tennessee Supreme Court found that the inclusion of the term "knowingly" defined T.C.A. §39-3010(F) rendered the statute constitutional in light of this Court's decisions in *Hamling v. United States*, 418 U.S. 87, 119-124, 94 S.Ct. 2887, 2909-2911 (1974) and *Mishkin v. New York*, 383 U.S. 502, 86 S.Ct. 958 (1966). See also *Rosen v. United States*, 161 U.S. 29, 41, 16 S.Ct. 434, 438 (1896). The decision of the Tennessee Supreme Court in this case is certainly in accord with the applicable decisions of this Court. The petitioner obviously has no standing to challenge that portion of T.C.A. §39-3013(A) which deals with live theatrical productions because the facts show that he was not engaging in this activity.

II

The Use of a Combination of Civil and Criminal Remedies to Prevent the Exhibiting, Distribution or Sale of Obscene Materials Has Been Approved by This Court.

The petitioner next attacks T.C.A. § 39-3019 because it contains a procedure permitting the use of civil or criminal proceedings to prevent the exhibition, distribution or sale of obscene materials. He bases his constitutional attack on the belief that the institution of a civil proceeding prior to the commencement of a criminal prosecution results in an improper search and seizure. The petitioner has no standing to raise this Fourth Amendment claim because as the manager of a theatre operated by his corporate employer which was open to the public, he had no reasonable expectation of privacy concerning the films he was exhibiting.

Further, the procedure available to the State by virtue of T.C.A. §39-3019 is one that has been approved by this Court on repeated occasions. This Court has held:

> "It is not for this Court thus to limit the State in resorting to various weapons in the armory of the law. Whether proscribed conduct is to be visited by a criminal prosecution or by a *qui tam* action or by an injunction or by some or all of these remedies is a matter within the legislature's range of choices."
>
> *Kingsley Books v. Brown*, 354 U.S. 436, 441, 77 S.Ct. 1325, 1328 (1957).

The mixture of civil and criminal remedies will pass constitutional muster as long as they do not impose an unconstitutional prior restraint on the freedom of speech. See generally *Southeastern Promotions, Ltd. v. Conrad*, 420 U.S. 546, 559, 95 S.Ct. 1239, 1247 (1975). In *Heller v. New York*, 413 U.S. 483, 93 S.Ct. 2789 (1973) and *Paris Adult Theatre I v. Slaton*, 413 U.S. 49, 93 S.Ct. 2628 (1973), this Court approved state procedures whereby allegedly obscene materials were temporarily restrained for evidentiary purposes after a neutral magistrate, focusing searchingly on the question of obscenity, has found that there is probable cause to believe that the obscenity laws are being violated. See also *McKinney v. Alabama*, — U.S. —, 96 S.Ct. 1189 (1976).

The procedure used by the State in this case is the one contemplated by T.C.A. §39-3019 and does not unduly interfere with an individual's First Amendment rights. After the petitioner received notice that the State had commenced a proceeding against him, he was directed to produce the film in court for review by the trial judge. The trial judge took this action only after determining that there was probable cause to believe that T.C.A. §39-3013 was being violated. Prior to the hearing, the petitioner was free to exhibit the film but could not alter or destroy it or remove it from the jurisdiction of the trial court. After the court had viewed the film and determined it to be obscene, the film remained in the Court's custody, and the petitioner was enjoined from further exhibition of the film. At this point, the First Amendment protection presumptively surrounding the film vanished, but still, the petitioner had the right to avail himself of an expedited appeal to the Tennessee Supreme Court pursuant to T.C.A. §39-3019(C).

III

The Petitioner Has No Standing to Challenge the Validity of the Search Warrant Provisions of T.C.A. §39-3016(A).

The petitioner also seeks to challenge T.C.A. §39-3016(A) on the basis of the fact that it allows a District Attorney General or his representative to seize one example of each piece of ob-

scene material in the accused's possession after there has been a judicial determination that there is probable cause to believe that the accused is violating T.C.A. §39-3013. The Tennessee Supreme Court properly declined to pass upon this issue because the petitioner did not have standing to challenge the search warrant provisions, no search warrant having been used in this cause. *Taylor v. State ex rel. Kirkpatrick, supra,* 529 S.W.2d at 698-699. In any event, the question raised in this regard is now moot because the Tennessee Supreme Court has already found this provision to be unconstitutional and has elided the offending language from T.C.A. §39-3016(A). *Anthony v. Carter, supra* at n.1.

IV

The Two Films in This Case Are Clearly Obscene.

The petitioner finally contends that the two films involved in this case are not hard core pornography because they depict only simulated sexual conduct. This Court, however, has ruled that simulated sexual conduct can be obscene. *Miller v. California,* 413 U.S. 15, 25-26, 93 S.Ct. 2607, 2615-2616 (1973). The definition of "sexual conduct" appearing in T.C.A. §39-3010(H) closely parallels this Court's examples of permissible state statutory language. The sexual conduct in these films is far different from that discussed by this Court in *Jenkins v. Georgia,* 418 U.S. 153, 94 S.Ct. 2750 (1974), and thus the petitioner's argument in this regard is without merit.

CONCLUSION

The respondent respectfully submits that both the Tennessee Supreme Court and the Tennessee Court of Criminal Appeals have decided this case in accord with the applicable decisions of this Court, and therefore, that the petition for writ of certiorari should be denied.

Respectfully submitted,

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APPENDIX

APPENDIX A

39-3010. Definitions for obscenity law.—Definition of terms as used in §§ 39-3010-39-3022 shall be as follows:

(A) "Obscene" means (1) that the average person applying contemporary community standards, would find that the work, taken as a whole, appeals to the prurient interest; (2) that the work depicts or describes, in a patently offensive way, sexual conduct; and (3) that the work, taken as a whole, lacks serious literary, artistic, political, or scientific value.

(B) "Prurient interest" means a shameful or morbid interest in sex.

(C) "Matter" means any book, magazine, newspaper, or other printed or written material or any picture, drawing, photograph, motion picture film, or other pictorial representation, or any statute, figure, device, theatrical production or live performance, or any recording, transcription, or mechanical, chemical or electrical reproduction, or any other article, equipment, machine or material that is obscene as defined by §§ 39-3010-39-3022.

(D) "Person" as used in §§ 39-3010-39-3022 shall include the singular and the plural and shall mean and include any individual, firm, partnership, copartnership, association, corporation, or other organization or other legal entity, or any agent or servant thereof.

(E) "Distribute" as used above means to transfer possession of, whether with or without consideration.

(F) "Knowingly" as used above means having actual or constructive knowledge of the subject matter. A person shall be deemed to have constructive knowledge of the contents if he has knowledge of facts which would put a reasonable and prudent man on notice as to the suspect nature of the material.

(G) "Community" as used above means the state of Tennessee.

(H) "Sexual conduct" as used above shall be construed to mean: (1) Patently offensive representations or descriptions of ultimate sexual acts, normal or perverted, actual or simulated. A sexual act is simulated when it depicts explicit sexual activity which gives the appearance of ultimate sexual acts, anal, oral or genital. The term "ultimate sexual acts" shall be construed to mean sexual intercourse, anal or otherwise, fellatio, cunnilingus or sodomy, or (2) Patently offensive representation or descriptions of masturbation, excretory functions, and lewd exhibitions of the genitals.

(I) "Patently offensive" as used above means that which goes substantially beyond customary limits of candor in describing or representing such matters.

39-3011. Telephone conversation—Lewd, obscene or lascivious remarks—Harassing calls—Penalty.—It shall be unlawful for any person or persons to communicate to another or others within this state, by means of telephone conversation, any lewd, obscene or lascivious remark, suggestion or proposal manifestly intended to embarrass, disturb or annoy the person to whom the said remark, suggestion or proposal is made. It shall also be unlawful for any person or persons to make use of telephone facilities or equipment (1) for an anonymous call or calls, whether or not a conversation ensues, if made or communicated in a manner reasonably to be expected to annoy, abuse, torment, threaten, harass or embarass one or more persons, or (2) for repeated calls, if such calls are not for a lawful purpose, but are made with intent to abuse, torment, threaten, harass or embarass one or more persons.

Any person or persons violating the provisions of this section shall be guilty of a misdemeanor, and upon conviction thereof

be fined not more than one thousand dollars ($1,000) and in the discretion of the court shall be confined in the county jail or workhouse for some period of time less than one (1) year.

39-3012. Businesses dealing in obscene material—Public policy—Libraries excluded.—The conducting of the business of selling, displaying, exhibiting or distributing obscene material as defined in §§ 39-3010-39-3022 and/or engaging in the business of operating an adult peep show house is hereby declared to be against public policy. Sections 39-3010-39-3022 shall not, however, be applicable to a "library" as defined in § 69-202.

39.3013. Importing or preparing in state for sale, distribution, or exhibition—Distribution to or employment of minors—Penalties.—(A) It shall be unlawful to knowingly send or cause to be sent, or bring or cause to be brought, into this state for sale, distribution, exhibition, or display, or in this state to prepare for distribution, publish, print, exhibit, distribute, or offer to distribute, or to possess with intent to distribute or to exhibit or offer to distribute any obscene matter. It shall be unlawful to direct, present, or produce any obscene theatrical production or live performance and every person who participates in that part of such production which renders said production or performance obscene is guilty of said offense.

(B) Notwithstanding any of the provisions of §§ 39-3010—39-3022, the distribution of obscene matter to minors shall be governed by § 39-1012 et seq. In case of any conflict between the provisions of §§ 39-3010—39-3022 and § 39-1012 et seq., the provisions of the latter shall prevail as to minors.

(C) It shall be unlawful to hire, employ, or use a minor to do or assist in doing any of the acts described in subsection (A) with knowledge that a person is a minor under eighteen (18) years of age, or while in possession of such facts that he or she should

reasonably know that such person is a minor under eighteen (18) years of age.

(D) (1) Every person who violates subsection (A) is punishable by a fine of not less than two hundred fifty dollars ($250) nor more than five thousand dollars ($5,000), or by confinement in the county jail or workhouse for not more than one (1) year, or by both fine and confinement. If such person has previously been convicted of a violation of §§ 39-3010—39-3022, a violation of subsection (A) is punishable as a felony by a fine of not less than five hundred dollars ($500) nor more than ten thousand dollars ($10,000), or by imprisonment in the state penitentiary for a term of not less than two (2) nor more than five (5) years or by both fine and imprisonment.

(2) Every person who violates subsection (C) is punishable by a fine of not less than two hundred fifty dollars ($250) nor more than five thousand dollars ($5,000) or by confinement in the county jail or workhouse for not more than one (1) year, or by both fine and confinement. If such person has been previously convicted of a violation of §§ 39-3010—39-3022, a violation of subsection (C) is punishable as a felony and by a fine of not less than five hundred dollars ($500) nor more than ten thousand dollars ($10,000) or by imprisonment in the state penitentiary for a term of not less than two (2) years nor more than five (5) years.

(3) Every person who violates subsection (D) is punishable by a fine of not less than five hundred dollars ($500) nor more than ten thousand dollars ($10,000), or by imprisonment in the state penitentiary for a term of not less than one (1) year nor more than five years, or by both such fine and imprisonment.

39-3014. Enforcement initiated by district attorney general—Warrant—Notice.—No criminal action to enforce the provisions of §§ 39-3010—39-3022 shall be commenced except upon application of the district attorney general or his designated repre-

sentative. Said application shall be made only with the knowledge of and approval by the district attorney general. Criminal action shall commence only on issuance of a warrant by a judge of a court of record. No warrant shall issue until the party against whom a warrant is sought is notified of the application for a warrant and given twenty-four (24) hours to appear and contest the existence of probable cause for the issuance of a warrant. If the defendant fails to appear after notice, the hearing shall be held in his absence.

39-3015. Contract to accept or distribute obscene material not a defense—Contract unenforceable.—Any contract to be performed in whole or in part in this state which requires any person, firm, or corporation to accept, receive, sell distribute, or purchase any material which is obscene, as defined in § 39-3010, whether as a condition precedent to other contractual arrangements or otherwise, shall be no defense to any criminal, civil, or injunction suit; and such a contract, to the extent that it may require any person, firm, or corporation to accept, receive, sell, distribute, or purchase any material which is obscene, is hereby declared to be against public policy and unenforceable.

39-3016. Search warrant—Seized material retained by district attorney general—Hearing.—(A) Upon a showing of probable cause that the obscenity laws of this state are being violated, any judge or magistrate shall be empowered to issue a search warrant in accordance with the general law pertaining to searches and seizures in this state which warrant shall authorize or designate a law enforcement officer to enter upon the premises where alleged violations of the obscenity laws are being carried on and take into custody one (1) example of each piece of matter which is obscene in the opinion of the district attorney general or his designated representative. Return on the search shall be in the manner prescribed generally for searches and seizures in the state of Tennessee, except that mat-

ter that is seized shall be retained by the district attorney general to be used as evidence in any legal proceeding in which said matter is in issue or involved.

(B) When a search and seizure takes place in accordance with this section, any person aggrieved by said search and seizure or claiming ownership of the matter seized, may file a motion in writing with a court of record in the jurisdiction in which the search and seizure took place, contesting the legality of the search and seizure and/or the fact of the obscenity of the matter seized. Said court shall set a hearing within one (1) day after the request therefor, or at such time as the requesting party might agree. In the event the court finds that the search and seizure was illegal or if the court or any other court of competent jursidiction shall determine that the matter is not obscene, said matter shall be forthwith returned to the person and to the place from which it was taken.

(C) Procedures under this section for the seizure of allegedly obscene matter shall be cumulative and in addition to all other lawful means of obtaining evidence as provided by the laws of this state. Nothing contained in this section shall prevent the obtaining of allegedly obscene matter by purchase or under injunction proceedings as authorized by §§ 39-3010—39-3022 or by any other statute of the state of Tennessee.

39-3017. Destruction of obscene material upon conviction. —Upon the conviction of the accused, the court may, when the conviction becomes final, order any matter or advertisement, in respect whereof the accused stands convicted, and which remains in the possession or under the control of the district attorney general or any law enforcement agency, to be destroyed, and the court may cause to be destroyed any such material in its possession or under its control.

39-3018. Noncitizens and those not present in state subject to penalties.—Every person, whether or not he is a citizen of

or present in this state, who knowingly prepares, publishes, or prints obscene matter for sale or distribution in this state, or who knowingly sends or causes to be sent into this state for sale or distribution any obscene matter or any advertising promoting the sale or distribution of obscene matter, shall be subject to the penalties of §§ 39-3010—39-3022, and the executive authority of this state shall demand extradition of such person from the executive authority of the state or foreign country in which such person is found.

39-3019. Temporary restraining orders and injunctions—Trial—Judgment—Review.—(A) The circuit, chancery, or criminal courts of this state and the chancellors and judges thereof shall have full power, authority, and jurisdiction, upon application by sworn detailed petition filed by the district attorney general within their respective jurisdictions, to issue any and all proper temporary restraining orders, temporary and permanent injunctions, and any other writs and processes appropriate to carry out and enforce the provisions of §§ 39-3010-39-3022. However, this section shall not be construed to authorize the issuance of ex parte temporary injunctions preventing further regularly scheduled exhibition of motion picture films by commercial theaters, such injunction to issue only upon at least one (1) day's notice, but the court may immediately forbid the removing, destroying, deleting, splicing, amending or otherwise altering the matter alleged to be obscene. The person or persons to be enjoined shall be entitled to trial of the issues within two (2) days after joinder of issue and a decision shall be rendered by the court within two (2) days of the conclusion of the trial. In order to facilitate the introduction of evidence at any hearing as provided herein, the court is hereby empowered to order defendants named in any proceeding set out herein to produce one (1) copy of the matter alleged to be obscene, along with necessary viewing equipment, in open court at the time of the hearing or at any time agreed upon by the

parties and the court. In proceedings under this section there shall be no right to trial by jury. If the defendant in any suit for injunction filed under the terms of this section shall fail to answer or otherwise join issue within twenty (20) days after the filing of a petition for injunction, the court, on motion of the district attorney general, shall enter a general denial for the defendant, and set a date for hearing on the questions raised in the petition for injunction within ten (10) days following the entry of the denial entered by the court and the court shall render its decision within two (2) days after the conclusion of that hearing.

(B) In the event that a final order or judgment of injunction be entered against the person sought to be enjoined, such final order or judgment shall contain a provision directing the person to surrender to the clerk of the court of the county in which the proceedings were brought any of the obscene matter in his possession and such clerk shall be directed to hold said matter in his possession to be used as evidence in any criminal proceedings in which said matter is in issue but if no indictment is returned concerning said matter within six (6) months of the entry of said final order, the said clerk shall destroy said matter.

(C) The review of any final decree, order or judgment shall be by broad appeal direct to the Supreme Court. Any party, including the district attorney general, shall be entitled to an appeal from an adverse decision of the court. The granting of an appeal shall have the effect of staying or suspending any order to destroy but not an order to seize such matter, nor shall the granting of an appeal suspend any permanent injunction granted by the trial court.

39-3020. Bond not required of prosecution.—Neither the state nor the district attorney general shall be required to file any injunction, cost or appeal bond or to pay any costs or service or process fees in actions filed under §§ 39-3010-39-3022.

39-3021. Conflict with rules of civil procedure.—The provisions of §§ 39-3010-39-3022 shall take precedence over the Tennessee Rules of Civil Procedure when there is any conflict between said rules and the provisions of §§ 39-3010-39-3022.

39-3022. Remedies supplementary.—The remedies and procedures set out in §§ 39-3010-39-3022 are supplementary to each other and no remedy shall be construed as excluding or prohibiting the use of any other remedy.

Except as expressly herein provided, the provisions of §§ 39-3010-39-3022 shall not be construed as repealing any provisions of any other statute, but shall be supplementary thereto and cumulative thereto.

APPENDIX B

September 7, 1976
For Publication

In the Supreme Court of Tennessee
at Nashville

Larry D. Anthony, William E. Frulla, Assistant District Attorney, and Hugh Stanton, Jr., District Attorney General,

Appellants,

v.

Carl R. Carter and William V. Mallozzi,

Appellees.

Shelby Law
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John R. McCarroll, Jr.,
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Opinion

Affirmed

Brock, J.

This is a direct appeal from a decision of the Circuit Court for Shelby County, Division II, holding that portions of the

Tennessee Obscenity Act, T.C.A. §§ 39-3010 et seq., relating to search and seizure are unconstitutional and that the search warrants employed in this case were general warrants prohibited by the Fourth Amendment to the U.S. Constitution. We affirm the judgment of the Circuit Court.

The appellees in this case are connected with a commercial operation which distributes magazines and movie films which the State contends are legally obscene. On April 1, 1975, the Criminal Court of Shelby County issued two search warrants authorizing the search of premises at two locations and certain automobiles in which the alleged obscene material was being stored or from which it was being distributed. The record contains copies of an "Affidavit for Probable Cause," signed by appellant Larry D. Anthony, in which the affiant summarizes information received from an informant who was formerly employed by appellees. This information generally describes the materials in the buildings as magazines and films "depicting sexual conduct and ultimate sexual acts." It also describes the method of distribution used by the appellees and describes an eyewitness account of the filming of an obscene motion picture in Memphis.

The warrants were executed on April 1, 1975. They authorized law enforcement personnel to search the premises and seize the following property:

> "books and records of Carl R. Carter pertaining to interstate and intrastate shipments of adult films; 8 mm and 16 mm adult films depicting sexual activity; and magazines depicting sexual activity in violation of Tennessee Code Annotated, Sections 39-3010, *et seq.*"

The statutory authority for such a warrant is T.C.A. § 39-3016 which purports to authorize law enforcement officers to "take into custody one (1) example of each piece of matter which is obscene in the opinion of the district attorney-general or his

designated representative." T.C.A. § 39-3016(A).[1] It is this portion of the obscenity statute which the court below held to be unconstitutional.

Upon execution of the warrants, the officers seized "about 40 or 50 movie films and a large quantity of business records pertaining to shipment of the films by appellees to "adult" theaters. The contention of the State that the two locations contained a total of about 300 films is apparently uncontested by appellees. There is no evidence in the record whether or not any of the remaining films were duplicates of each other or duplicates of those seized. The seizure also included two 16 mm movie projectors and a briefcase which, among other things, contained the personal checkbook of one of the appellees.

On April 14, 1975, the appellees filed a motion in the Circuit Court seeking a return of the items seized, as authorized by T.C.A. § 39-3016(B). On April 21, 1975, the court ordered the immediate return of the two projectors and the briefcase and checkbook; all other materials remained in the State's custody.

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[1] "39-3016. Search warrant—Seized material retained by district attorney general—Hearing.—(A) Upon a showing of probable cause that the obscenity laws of this state are being violated, any judge or magistrate shall be empowered to issue a search warrant in accordance with the general law pertaining to searches and seizures in this state which warrant shall authorize or designate a law enforcement officer to enter upon the premises where alleged violations of the obscenity laws are being carried on and take into custody one (1) example of each piece of matter which is obscene in the opinion of the district attorney general or his designated representative. Return on the search shall be in the manner prescribed generally for searches and seizures in the state of Tennessee, except that matter that is seized shall be retained by the district attorney general to be used as evidence in any legal proceeding in which said matter is in issue or involved.

"(B) When a search and seizure takes place in accordance with this section, any person aggrieved by said search and seizure or claiming ownership of the matter seized, may file a motion in writing with a court of record in the jurisdiction in which the search and seizure took place, contesting the legality of the search and seizure and/or the fact of the obscenity of the matter seized. Said court shall set a hearing within one (1) day after the request therefor, or at such time as the requesting party might agree. In the event the court finds that the search and seizure was illegal or if the court or any other court of competent jurisdiction shall determine that the matter is not obscene, said matter shall be forthwith returned to the person and to the place from which it was taken."

The court then held a hearing on the motion and determined that (1) the search warrants were constitutionally invalid "general warrants" and that (2) the above-mentioned portion of 39-3016(A), which allows the district attorney general or his representative "the power to make an on-the-spot determination whether or not material is obscene", and, therefore, subject to seizure, was unconstitutional. The court then ordered the return of all items seized in the April 1 action.

On July 8, 1975, upon appellants' motion, Mr. Chief Justice Fones issued a writ of supersedeas to stay the Circuit Court's order pending outcome of this appeal. The seized materials thus remain in the custody of the district attorney general.

The Circuit Court, in holding the above quoted portion of 39-3016(A) to be unconstitutional, relied upon *Marcus v. Search Warrant*, 367 U.S. 717, 81 S. Ct. 1708, 6 L. Ed. 2d 1127 (1961) and *A Quantity of Copies of Books v. Kansas*, 378 U.S. 205, 84 S. Ct. 1723, 12 L. Ed. 2d 809 (1964).

The *Marcus* case involved a wholesale distributor of allegedly pornographic books and magazines. A police lieutenant visited the defendant as part of a vice squad investigation and determined that he distributed certain specified publications. Upon this information, a warrant was issued authorizing officers to seize obscene materials. A search and seizure followed that netted 11,000 copies of 280 publications, only 100 of which were later found to be legally obscene. The Supreme Court held this action to be unconstitutional, saying:

". . . the warrants issued on the strength of the conclusory assertions of a single police officer, without any scrutiny by the judge of any materials considered by the complainant to be obscene. The warrants gave the broadest discretion to the executing officers; *they* merely repeated the language of the statute and the complaints, *specified no publications, and left to the individual judgment of each of the many police officers involved the selection of such magazines as in his view constituted 'obscene * * * publications.'*

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"They were provided with no guide to the exercise of informed discretion, because there was no step in the procedure before seizure designed to focus searchingly on the question of obscenity." 81 S. Ct. at 1716." (Emphasis added.)

The *Marcus* decision was followed in *A Quantity of Copies of Books v. Kansas*, which also involved a "massive" seizure of publications designed to permanently restrain their distribution. See also *Lee Art Theatre v. Virginia*, 392 U.S. 636, 88 S. Ct. 2103, 20 L. Ed. 2d 1313 (1968).

It is too well settled to require citation of authority that the Fourth Amendment requires that an impartial magistrate, rather than the prosecutor or a police officer, make the determination, not only whether or not a warrant shall issue, but also the specification of the articles to be seized and the place to be searched. Clearly, then, T.C.A. § 39-3016(A), insofar as it purports to authorize police officers to seize such articles as are obscene in the opinion of the attorney general or his designated representative violates the Fourth Amendment and is void.

Likewise, the warrants in this case in describing the articles to be seized use language markedly lacking in the specificity

required by the Fourth Amendment mandate that "no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

Since the Supreme Court's 1965 decision in *Stanford v. Texas*, 379 U.S. 476, 85 S. Ct. 506, 13 L. Ed. 2d 431, it is clear that more specificity is required when the object of the seizure involves the First Amendment. As the Court said in *Stanford*:

> "In short, what this history indispensably teaches is that the constitutional requirement that warrants must particularly describe the 'things to be seized' is to be accorded the most scrupulous exactitude when the 'things' are books, and the basis for their seizure is the ideas which they contain. (Citing *Marcus v. Search Warrant, supra*, and *A Quantity of Copies of Books v. Kansas, supra*.) No less a standard could be faithful to First Amendment freedoms.
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> " 'The requirement that warrants shall particularly describe the things to be seized makes general searches under them impossible and prevents the seizure of one thing under a warrant describing another. As to what is to be taken, nothing is left to the discretion of the officer executing the warrant.' " 85 S. Ct. at 511-512.

We, therefore, hold that the warrants in this case were unconstitutional general warrants and that the portion of T.C.A. 39-3016(A) reading "in the opinion of the district attorney general or his designated representative" is unconstitutional under the authorities previously cited. Furthermore, the statute, the warrants and the seizures also violate Article 1, Sec. 7, Constitution of Tennessee, in the same particulars as above

discussed with reference to the Fourth Amendment.[1] However, we think the doctrine of elision can be applied in this instance to strike only the phrase quoted above in order to preserve the continuity of the statute and spare it from constitutional infirmity. See *Armistead v. Karsch*, 192 Tenn. 137, 237 S.W.2d 960 (1951). Both parties agree in their briefs to the elision. The judgment of the Circuit Court is affirmed. Appellants will pay the costs on appeal.

/s/ Ray Brock, J.

Concur:

Cooper, C.J.
Fones, J.
Henry, J.
Harbison, J.

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[1] Article 1, Sec. 7, Constitution of Tennessee, provides:

"That the people shall be secure in their persons, houses, papers and possessions, from unreasonable searches and seizures; and that general warrants, whereby an officer may be commanded to search suspected places, without evidence of the fact committed, or to seize any person or persons not named, whose offenses are not particularly described and supported by evidence, are dangerous to liberty and ought not to be granted."